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(20,019.)

# Supreme Court of the United States.

October Term, 1906.

No. 168.

J. CHARLES McGUIRE AND WILLIAM McGUIRE,
*Plaintiffs in Error,*

*vs.*

LOUIS GERSTLEY AND WILLIAM GERSTLEY,
*Surviving Partners of the Firm trading as Rosskam, Gerstley & Company.*

## REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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## REPLY BRIEF FOR PLAINTIFFS IN ERROR.

### I.

In the brief for defendants in error, p. 1, the condition of the bond is stated according to their interpretation thereof and not according to its terms, meaning or legal effect; their contention being that "the bond is silent as to terms upon which the merchandise was to be bought" (p. 13), and that the bond covered *all* merchandise sold by the plaintiffs to the principal obligors "on *any* credit, or no credit at all" (p. 6).

This contention is wholly unfounded. The bond recites the desire of the principals to purchase from the obligees merchandise which the principals "have bound and hereby bind themselves to pay for in four months after the date of each respective purchase." The words "have bound"

must be understood to refer to some subsisting agreement for purchases on four months' credit. The condition is to pay for merchandise "so purchased"; meaning merchandise for which the principals at and before the date of the bond bound themselves to pay for in four months after the purchase thereof.

If the parties had intended the bond to have the meaning and effect contended for by defendants in error (p. 6), the term of credit would have been omitted from the recital and inserted in the condition in lieu of the words "when and as the same shall become due and payable" (R., 3).

The sureties had no reason to contemplate liability under this bond for goods "sold on *any* credit or no credit at all." The bond is not "silent as to terms." It relates only to goods sold on a credit of four months, and sales on any other terms would be outside the contract.

That the goods in suit were sold on other terms, is one of the principal grounds of defense, and particularly in the 3d and 2d separate pleas of the surety (R., 8, 9).

See also original brief for plffs. in error, pp. 13, 14, 9, 10.

## II. THE PLEAS OF SET-OFF: DAMAGES.

(*a*) At p. 6 of their brief, defendants in error contend that damages for value of the business, lost profits and injury to credit are too conjectural and remote. The authorities cited by them do not sustain the contention. 53 Miss., 303, 306, and 52 Ark., 246, expressly admit that the defendant's claim would be well founded if it appeared "that he was without means, or other property to furnish a basis of credit, to purchase" the goods contracted for; and that is precisely what does appear in the first joint plea (R., 5).

Sedgwick on Damages, 8th Ed., is cited freely by defendants in error. Sec. 146 is an explanation of the rule in Hadley *v.* Baxendale, and states that plaintiff may recover if he can show "certain special facts to have been known to the

defendant at the time of the contract, which would give notice to him that a breach of the contract would result in an otherwise unexpected loss," and calls attention to the fact that in Hadley *v.* Baxendale, " the Court added, that if the special circumstances had been known at the time of the contract of bailment, the damages claimed might have been recovered."

In the case at bar the "special circumstances" were well known to the obligees in the bond at the date thereof. They knew that the principal obligors were forming a copartnership for the purpose of establishing a demand for the goods of the obligees and to carry on the sale of such goods in the District of Columbia, and would have to rely wholly upon the continuous credit; being without other means or capital to sustain the business of the copartnership (R., 5).

Sedgwick, after a discussion of the rules as to proximate and remote loss, states (Sec. 122): "For the purpose of making this subject clearer; all losses, as has been seen, are either direct or consequential; and, further, consequential losses are either proximate or remote. A direct loss must always be compensated; a remote loss, never. Between the two lies the debatable ground of proximate loss. Proximate losses are either natural or unexpected. Of these, natural losses must always be compensated; unexpected losses cannot. But the line between the two latter classes of loss is a varying one; it depends, as will be seen, not only upon the nature of the wrongful act, but also upon the expectations which the wrongdoer, as a reasonable man, could have formed as to its result. Notice to the wrongdoer of a probable consequence may render that consequence a natural one, though it might otherwise have been unexpected. Compensation may be recovered for such proximate losses as are also the natural results of the wrongful act, either in the nature of things, or in the light of special circumstances of which the wrongdoer had notice."

"The effect of notice under the rule in Hadley *v.* Baxendale, is to enlarge the boundaries of natural consequences," and "A defendant has notice of what will occur in the ordinary course of business" (Sedgwick, Sec. 157). And, though notice must form the basis of the contract, yet it need not be a part of the contract. Proof of such notice is not received to vary the contract but is merely an attendant circumstance, "which, like any other matter in evidence, affects the consequences of the breach and the measure of recovery" (*Id.*, Secs. 159, 160).

Sedgwick, at Sec. 160, cites the case, 4 Q. B. Div., 670, where plaintiff recovered expenses incurred and profits of which he was deprived by defendants' breach, upon the ground of notice to the defendant, at the time of making the contract, of the special circumstances by reason of which the defendant might have foreseen the injury caused by his breach.

"Where the cause of action is a direct blow to the credit or trade of the plaintiff," loss of credit or custom is not too remote; as where defendant, agent of plaintiff in G., broke his contract to keep a cash account of £500 to meet plaintiff's drafts, and in consequence a draft was returned dishonored. Defendant was held liable for the loss of trade in G. which was consequently suspended and for loss in the general business of the plaintiff because of his impaired credit.

Sedgwick, Sec. 127.

"The plaintiff, then, may in all proper cases show a gain prevented as a ground for compensation." "If a plaintiff is not allowed to recover compensation for a gain prevented, it must be either because the failure to realize the gain is too remote and unlooked for a consequence of the injury, or because it is uncertain whether the gain would have been realized; and not because the gain was in the nature of an expected profit."

*Id.*, Sec. 176.

The plea alleges that the principal obligors "entered upon and fully established" the business; that they "did establish and thereafter conduct" the business; that in the business their profits were very great, and that they lost all their time, money and labor expended, etc. (R., 5–7). Profits in such case may be considered in damages.

*Id.*, Sec. 182.

The case, 42 Minn., 420, 422, cited by defendants in error, recognizes the rule stated by Sedgwick as to notice.

(b) There is nothing in the agreement for continuous credit to prevent performance within one year from the making of the agreement. The breach complained of occurred within four months.

(c) Waterman on Set-off, Sec. 648, says, "A plea of set-off need not, however, be as certain and formal as a declaration." Reasonable certainty, so as not to take the defendant by surprise, is sufficient.

The code, D. C., Sec. 1563, provides that set-off shall be by plea in bar; and Sec. 1565 does not make set-off an action, but merely puts a defendant in such a position that the plaintiff cannot evade the plea of set-off by dismissal of the suit.

The authorities cited by defendants in error, at pages 10 and 11 of their brief, are inapplicable. They refer to statutes not in the terms of the code D. C., Sec. 1563, which allows set-off of claims "between any of the several defendants and the plaintiff." These words last above quoted were inserted in the code by amendment, June 30, 1902.

## III.

Counsel for plaintiffs in error, in reference to the propositions at p. 11 of the brief for defendants in error, concurs in the statement that "The absurdity of these propositions is manifest in their statement." The absurdity arises from

the attempt to misrepresent the nature and effect of the plea in question, which speaks for itself.

## IV. SIXTH SEPARATE PLEA.

The case, 11 How., 461, cited by defendants in error at p. 13, and their proposition based upon that authority, are inapplicable. Sec. 1563 of the code, D. C., provides for set-off of "mutual debts and claims under contract," * * "whether said debts or claims be of the same or a different nature or degree." Under this statute a plaintiff may sue under one contract and the defendant may set off his claim under another contract.

The case, 168 U. S., 328, cited by them at p. 12, does not go as far as they say. Further, the partnership should not be considered as one at will.

The grounds of the plea are stated in our original brief, pp. 11, 12. It does not claim damages, but alleges as matters of discharge wrongdoing by the obligees which was actionable.

The Court will presume that the "wholesale liquor" business of Monaghan and McGuire, which they established in September, 1903, and maintained until January 12, 1904, was so established and maintained by them in accordance with the law which required them to obtain a license. The license so held by them in January, 1904, would not expire until November 1, 1904.

Act Cong. Mch. 3, 1893, Sec. 17, 27 S. L., 567.

The application for such license implied an agreement and imposed a duty to continue the partnership until the latter date, *i. e.*, during the term of the license, unless both partners consented to an earlier dissolution.

17 A. & E. Enc. (1st Ed.), 1096, and note 3;

1 R. I., 430, 443, Potter *v.* Moses.

Even in a partnership at will, a dissolution by the act of one partner must be done in good faith and seasonably.

Pothier, cited 3 Kent Com., 53, note d;
22 A. & E. Enc. (2d Ed.), 205.

An action at law will lie for a premature dissolution in violation of the partnership. In such a suit the claim will be for the wrong done the plaintiff personally as distinguished from a breach of duty owing to the firm.

17 A. & E. Enc. (1st Ed.), 1264, 1265.

And if there be collusion between a third person and a partner to injure the firm, they or either of them may be sued at law by the injured partner.

17 A. & E. Enc. (1st Ed.), 1266, 1267;
Moo. & M., 223, Longman *v.* Pole (22 Eng. C. L. R., 513);
103 N. Y., 235, 240, Sweet *v.* Morrison.

Such collusion and injury are shown by the 6th separate plea of the surety.

In Bowen *v.* Hall, 6 Q. B. Div., 339, the broad principle is laid down that a man who induces one of the parties to a contract to break it, intending thereby to injure the other party, is liable in an action. This principle is amply supported by American cases and is not confined to contracts for service.

107 Mass., 555, 565; 76 N. C., 355; 66 N. Y., 82;
2 Wend., 385; Lawson on Contracts, Sec. 115.

The fact, in such a case, that the contract is not binding under the Statute of Frauds, is immaterial.

66 N. Y., 82, 84, Rice *v.* Manley;
2 Wend., 385, Benton *v.* Pratt.

V.

The case in 47 Iowa, 357, cited by defendants in error, p. 15, is inapplicable to a case like the one at bar, in which

the bond was given to secure payment for goods to be sold on four months' credit, as set forth in the bond, and the surety alleges that the goods sold were not sold on those terms.

VI.

Our original brief is relied upon to meet all other points raised in the brief for defendants in error.

LORENZO A. BAILEY,
*For Plaintiffs in Error.*